IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16500 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NILKANTH TULSIDAS BHATIA - Petitioner(s)
Versus
UNION OF INDIA & 7 - Respondent(s)

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Appearance :
MR NAGESHWAR RAO, SENIOR ADVOCATE WITH MR YF MEHTA, for the Petitioner.
Mr. N.D.Nanavati, Senior Advocate with Ms. Megha Jani for respondent nos. 1 to 3.

Mr. J.M.Malkan for respondent nos. 4 and 5.

MR PRANIT K NANAVATI for Respondent(s) : 7,
MR K.B.TRIVEDI, Advocate General with Mr. S.S.Shah, Government Pleader for Respondent no.8.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 13/10/2006

ORAL JUDGMENT

The present petition challenges the action of the Central Government of an appointment of a High Level Committee under Article 73 of the Constitution of India vide notification dated 4th September, 2004 as well as the notification dated 2nd December, 2005 whereby High Level committee is clothed by additional powers under section 11 of the Commissions of Inquiry Act, 1952 (hereinafter referred to as "the Act,1952").

2. An important issue which has arisen for adjudication of this Court is :

> *Whether executive powers vested in the Central Government under Article 73 of the Constitution of India can be invoked by appointing a Committee for the purposes referred to in the notification dated 4th September, 2004 when already there is existence of Railways Act, 1989, occupying the field, especially keeping in mind the provision of sections 113 to 118 and also keeping in mind a statutory bar created by*
> *(i) Section 119 of the Railways Act,1989; and*
> *(ii) Section 3 of the Commissions of Inquiry Act,1952 and when the State Government has appointed a Commission headed by a retired judge of Hon'ble Supreme Court and a retire judge of this Court, under section 3 of the Commissions of Inquiry Act, 1952? Thus,*

whether executive powers can be exercised, where a particular field is occupied by law and despite the statutory bar.

3. I have heard Learned Senior Advocate, Mr. Nageshwar Rao, with learned advocate Mr. Y.F.Mehta for the petitioner, who have mainly submitted that the notification issued by the Central Government dated 4th September, 2004 under Article 73 of the Constitution of India is ultra vires the provisions of the Railways Act, 1989. (Hereinafter referred to as “the Act, 1989”). It is also submitted by the learned Senior Advocate that the executive powers under Article 73 of the Constitution of India cannot be utilised by the Union of India when already the State has appointed a Commission under section 3 of the Act, 1952. Executive powers under Article 73, cannot be used, when, for that very subject a law is already enacted and is in force. The notification has been issued with a malafide intention. The incident had taken place on 27th February, 2002. The State appointed the Commission under section 3 of the Act of 1952 on 6th March, 2002 and after two years and seven months, the powers under Article 73 of the Constitution of India have been exercised by the Central Government. It is also submitted by the

learned Senior Advocate that apart from delay, the interim report of the High Level Committee was submitted at such a crucial time, that is, on 17th January, 2005 which was just two days prior to the Assembly elections of the State of Bihar. Wide publicity was also given to this report. All these affect a very vital right, vested in the petitioner of fair trial, under Article 21, of the Constitution of India. It is also submitted by the learned Senior Advocate for the petitioner that the petitioner is not a total stranger to the whole incident. The petitioner is the victim of the incident which took place on 27th February, 2002. The statement of the petitioner as well as that of his wife have been recorded. The petitioner has also suffered physical injuries. The petitioner was hospitalised for considerably a longer time. Interim report is totally giving diagonally opposite theory of the assault. The police has investigated the criminal offence. Upon completion of the investigation, charge-sheets have been filed, propounding a theory of assault by setting up of fire. The High Level Committee appointed vide notification dated 4th September, 2004, in exercise of powers under Article 73 of the Constitution of India, in face of section 119 of the

Act of 1989, propounds the theory of accident. The learned Senior Advocate for the petitioner further submitted that all these factors compelled the petitioner to prefer the present petition and seek a writ of mandamus for a declaration that the notification dated 4th September, 2004 issued in exercise of powers under Article 73 of the Constitution of India and the notification dated 2nd December,2005 empowering High Level Committee under section 11 of the Act of 1952 affect the present petitioner and hence the cause has been brought to the door of the Court. Several breaches of the act of 1989 have been pointed out. Usage of power under Article 73 of the Constitution of India has been vehemently opposed by the learned counsel for the petitioner. It is also submitted by the learned Senior Advocate for the petitioner that there is a colourable exercise of powers by Union of India under Article 73 of the Constitution of India. He has also explained in detail the term “colourable exercise of powers” with the help of several judgments which are referred to hereinafter. It is also stated by the learned Senior Advocate for the petitioner that the power exercised under Article 73 of the Constitution of India is not only colourable exercise of powers,

but it is also used mala fide. There is section 119 which prohibits inquiry by the Commissioner of Railway Safety, once the Commission is appointed, under the Act of 1952. Likewise, section 3 of the Act of 1952, prohibits, the Central Government to appoint another Commission, if the State has appointed a Commission, for the same matter. Keeping in mind these two provisions, the powers exercised by the Union of India under Article 73 of the Constitution of Indian for appointment of a High Level Committee is illegal, void and deserves to be quashed and set aside. An act, which cannot be done directly, can never be done indirectly. It is also stated by the learned Advocate for the petitioner that by giving powers under section 11 of the Act of 1952, the High Level Committee cannot be equated with the Commission under the Act of 1952. It is also stated by the learned Senior Advocate for the petitioner that if authorised purposes and unauthorised purpose for the appointment of the Committee are so interwoven with each other, that they cannot be segregated. Predominant nature is to be seen and predominant nature of the scope of appointment of High Level Committee is over-lapping with the scope and sphere of the Commission appointed by the State Government

under the Act of 1952 dated 6th March, 2002. The learned Senior Counsel has also compared the scope of inquiry, by the Commission, appointed by the State Government and scope of the inquiry, by High Level Committee, appointed by the Central Government under Article 73 of the Constitution of India and it is pointed out that subsequently appointed High Level Committee is assigned the functions which are predominantly the same as those of, the functions of the Commission, appointed by the State under the Act of 1952 and therefore also, the powers exercised by the Central Government under Article 73 of the Constitution of India for appointment of a High Level Committee deserves to be quashed and set aside. The learned counsel has also pointed out on facts, certain observations of the Division Bench of this Court and has pointed out that factually, the theory of accident propounded in the interim report is running counter to certain observations made by the Division Bench of this Court and thereby it also affects a fair trial, in several Sessions Cases which are pending for their adjudication. Those judgments are referred to hereinafter in the subsequent paragraphs. The learned counsel for the petitioner has also placed reliance on several judgments in

support of his arguments so far as locus standi is concerned and it is pointed out that when executive violates and exceeds its jurisdiction, locus is not very material. Nonetheless, as stated above, he is directly and vitally affected person. The learned counsel for the petitioner has relied upon the following judgments.

4. I have heard the learned Senior Advocate Mr. N.D.Nanavati with learned advocate Ms. Megha Jani, for the respondent no.1, who have pointed out that the petitioner has no locus standi to prefer the present petition against appointment of a High Level Committee by the Union of India under Article 73 of the Constitution of India. In fact, no injury has been caused to the petitioner by this appointment of High Level Committee. It is also submitted by the learned counsel for the respondent no.1 that the notifications dated 4th September, 2004 and 2nd December, 2005 issued by the Union of India are absolutely in consonance with the provisions of the Constitution of India, the Act of 1989 and the Act of 1952. The executive powers have been correctly utilised by the Union of India. There is no occupied filed as alleged by the learned advocate for the

petitioner. The learned Senior Advocate for respondent no.1 has read the scope and ambit of the High Level Committee and the scope and ambit of the Commission appointed by the State under the Act of 1952 and pointed out that the High Level Committee appointed by the Union of India under Article 73 of the Constitution of India has been appointed for finding out the cause of fire and for giving advice to the Railway Ministry. The inquiry relates to more than one State. The word “cause” is missing in the nature and scope of the inquiry by the State Commission. The State Commission has not yet completed its inquiry. It is also stated by the learned Senior Advocate that in fact, the State Government has no power, jurisdiction and authority to appoint the Commission for the subject matter which falls in list-I, that is, Union list, especially for entry no. 22 thereof in 7th schedule to the Constitution of India and therefore, in fact, the respondent no.1 has got all powers for appointment of the Commission under the Act of 1952. Nonetheless, the Union of India has respected the Commission appointed by the State, but that never ousts the powers of Union of India to appoint a High Level Committee under Article 73 of the Constitution of

India. It is also submitted by the learned Senior Advocate for respondent no. 1 that after appointment of the High Level Committee, vide notification dated 4th September, 2004, at a belate stage, the present petition has been preferred by the petitioner. It is also stated by the learned Senior Counsel for respondent no.1 that no prejudice is going to be caused to the petitioner as the trial is not going to be affected by the report of the High Level Committee. The learned Senior Counsel has also relied upon certain judgments which indicate that there can be no effect upon the trial by the report of the Commission. Thus, the petitioner will suffer no injury, even by the appointment of the High Level Committee vide notification dated 4th September, 2004. He has vehemently read and re-read the judgment reported in **1988(3) SCC 609** and various paragraphs thereof. It is further submitted by him that in fact, the High Level Committee has been appointed to find out the cause of fire and the reasons for the fire caused in various coaches of Sabarmati Express on 27th February, 2002. Therefore, there is no dispute, no lis, before the High Level Committee and its decision is neither an order nor a judgment. Nothing is binding upon anyone much less upon the court

which is conducting Sessions cases. The interim report has already been published on 17th January, 2005 and therefore, nothing remains in the present petition and the petition, has, in fact, become infructuous. The learned Senior advocate has also relied upon Rule 2(6) of Statutory Investigation Into Railway Accidents Rules, 1998. It is stated by the learned Senior Advocate that these Rules give enough guidelines for interpretation of section 119 of the Act of 1989 which make it explicitly clearer that the Commission as envisaged under section119 of the Act of 1989 means the Commission appointed by the Central Government. Therefore, if the Commission is appointed by the State, it cannot be said that “the field is occupied by law”. Therefore, respondent no.1 has got all powers to exercise executive powers under Article 73 of the Constitution of India. Thus, the help of the aforesaid Rules has been taken, for the interpretation of section 119 of the Act,1989. It is also further submitted by the learned Senior Advocate for respondent no.1, that even otherwise also, section 119 of the act of 1989 is not a bar or ban for appointment of a High Level Committee. The learned counsel has also relied upon the judgment delivered by the Hon'ble Apex Court reported in **AIR**

1955 SC 548 and has pointed out the scope and ambit of usage of powers under Article 73 of the Constitution of India and submitted that looking tot he facts of the present case, the powers exercised under Article 73 of the Constitution of India for issuance of the notification dated 4th September, 2004 cannot be said to be ultra vires the Act of 1989 or the Act of 1952 and therefore, the petition may not be entertained by this Court.

5. I have also heard learned Advocate Dr. Mukul Sinha who is the intervener in the petition, who has pointed out that looking to the prayers in the petition has become infructuous. The appointment of the High Level Committee is for a fixed term. Once the term is over, the petition has become infructuous. Even interim report of the Committee has been already published on 17th January, 2005 and therefore, other prayers of the petition cannot be granted to the petition. It is stated by the learned advocate Mr. Sinha that looking to the provisions of the Act of 1989, it cannot be said that the field is occupied by this Act of 1989. On the contrary, there can be more than one High Level Committees, looking to the complexity of facts involved in the incident.

The learned counsel Mr. Sinha has also relied upon judgments delivered by the Hon'ble Apex Court reported in **1998(8) SCC 735 and 2003(3) SCC 117** and pointed out that the Court should not issue a writ in the petition which has become infructuous. Passage of time and efflux of time sometimes makes petition infructuous. This petition is no exception to that rule and therefore, the petition may not be entertained by this Court. The learned counsel has also argued at length, the powers and scope under Article 73 of the Constitution of India to be read with the provisions of the Act of 1989 and the Act of 1952 and has pointed out that there is no violation of any of the provisions of the Act of 1989 not of the Act of 1952 by appointment of a High Level Committee by the Union of India vide notification dated 4th September, 2004.

6. I have also heard the learned Advocate General Mr. K.B.Trivedi for the respondent State of Gujarat who has submitted that the notification dated 4th September, 2004 issued by the Central Government, is patently violative of the provisions of the Act of 1989 and the provisions of the Act of 1952. It is also submitted by the learned Advocate General that

executive powers cannot be exercised for the field (subject matter) which is already occupied the law. The executive ought to follow the law drafted by the Parliament or by the State Legislative Assembly. If no law is enacted upon a particular subject or for a particular purpose, the executive powers under Article 73 of the Constitution of India can be exercised or when the law has been enacted, but, upon a particular subject, if it is silent, in such circumstances also, powers under Article 73 of the Constitution of India can be exercised. But, when already an explicitly clear law is in existence, in defiance of the provisions of the Act, no executive powers can be exercised by Union of India under Article 73 of the Constitution of India. The executive powers cannot replace the provisions of law. Executive powers can be exercised when no guidance is given by law. Once law guides the executive, the executive ought to follow the law, whether they like or not. Even for achieving better results, the field which is occupied by law, should be kept open for following that law by the executives. If the executive are using powers, even if field is occupied by law, it is usage of powers, despite incompetency which tantamounts to colourable

exercise of powers. Looking to the facts of the present case, it is stated by the learned Advocate General that sections 114 and 115 of the Act of 1989 clearly empower the Commissioner to hold an inquiry into the cause that lead to an accident. Powers for holding inquiry by the Commissioner have also been mentioned under section 116 of the Act of 1989. Even power to administer oath has also been given to the Commissioner of Railway Safety, under the Act of 1989. Once these provisions are in existence, the powers cannot be exercised under Article 73 of the Constitution of India. The respondent no.1 ought to follow this procedure in holding an inquiry. The method of holding inquiry has been clearly referred to in the Act of 1989 by the notification dated 4th September, 2004. These provisions have been given go-by. This is not permissible during Rule of law. Several judgments have been quoted by the learned Advocate General which will be referred to hereinafter. It is also stated by the learned Advocate General that in fact, initially, the Commissioner had already pointed out that he is unable to hold an inquiry. His inability he has already shown in writing to the higher officers. Thereafter, the Commission has been appointed by the

State under the Commission of Inquiry Act, 1952. The learned Advocate General has also relied upon section 119 of the Railways Act,1989 and pointed out that once Commission is appointed under the Act of 1952, it alone can go into the cause of accident. Neither any Committee can be appointed by the Central Government nor the Commissioner of Railway Safety, can continue any inquiry, under sections 114, 115 and 116 of the Act of 1989. It is also stated by the learned Advocate General that by publishing interim report, the petition has not become infructuous. Once initiation of action of usage of Article 73 of the Constitution of India, for appointment of a High Level Committee, if declared as void, all the subsequent action is nothing but a nullity. It is also further submitted by the learned Advocate General that he has seen the stage of inquiry of the Commission appointed by the State and he has made a statement that on or before December, 2006, the functions assigned to the Commission vide notification dated 6th March, 2002 will be over and most likely, its report may be given by that time. The State will assist the Commission so that report may be submitted as expeditiously as possible. Nonetheless, statistical figures have been given by

the learned Advocate General as to how many witnesses have been examined and how many affidavits have been received by the Commission. These figures are more than 1000. It is further stated by the learned Advocate General that in view of the provisions of the Act of 1989 and the Act of 1952, the Union of India has no power to appoint a Committee vide notification dated 4th September, 2004 and therefore, further empowering the Committee vide notification dated 2nd December, 2005 (issuing notification under section 11 of the Act of 1952) also deserves to be quashed and set aside.

7. Having heard the learned advocates for both the sides and looking to the facts and circumstances of the case, I am of the opinion that the notification dated 4th September, 2004 issued by respondent no.1 Union of India under Article 73 of the Constitution of India as well as the subsequent notification dated 2nd December, 2005 issue under section 11 of the Act of 1952, are violative of the provisions of the Act of 1989 as well as violative of the provisions of the Act of 1952 and the powers exercised under Article 73 of the Constitution of India are bad in law and therefore, the same deserve

to be quashed and set aside for the following facts and reasons:

(A) Necessary provisions of the Act of 1989, the Act of 1952 and of Statutory Investigation into Railways Accident Rules,1998 which are read and re-read and relied upon by learned advocates for both the sides are as under:

Sections 2(6), 5, 114, 115, 116 and 119 of the Railways Act, 1989, read as under:

> *"**Section 2(6) "Commissioner"** means the Chief Commissioner of Railway Safety or the Commissioner of Railway Safety appointed under section 5;"*
>
> ***"Section 5. Appointment of Chief Commissioner of Railway Safety and Commissioners of Railway Safety.**- The Central Government may appoint a person to be the Chief Commissioner of Railway Safety and such other persons as it may consider necessary to be the Commissioners of Railway Safety."*
>
> ***"Section 114. Inquiry by Commissioner-** (1) On the receipt of a notice under section 113 of the occurrence of an accident to a train carrying passengers resulting in loss of human life or grievous hurt causing total or partial disablement of permanent nature to a passenger or serious damage to railway property, the Commissioner shall, as soon as may be, notify the railway administration in whose jurisdiction the accident occurred of his intention to hold an inquiry into the causes that led to the accident and shall at the same time fix and communicate the date, time and place of inquiry:*
>
> *Provided that it shall be open to the Commissioner to hold an inquiry into any*

other accident which, in his opinion, requires the holding of such an inquiry.

(2) If for any reason, the Commissioner is not able to hold an inquiry as soon as may be after the occurrence of the accident, he shall notify the railway administration accordingly."

"Section 115. Inquiry by railway administration- *Where no inquiry is held by the Commissioner under sub-section (1) of Section 114 or where the Commissioner has informed the railway administration under sub-section (2) of that section that he is not able to hold an inquiry, the railway administration within whose jurisdiction the accident occurs, shall cause an inquiry to be made in accordance with the prescribed procedure."*

"Section 116. Powers of Commissioner in relation to inquiries-*(1) For the purpose of conducting an inquiry under this Chapter into the causes of any accident on a railway, the Commissioner shall, in addition to the powers specified in section 7, have the powers as are vested in a civil court while trying a suit under the Code of Civil Procedure,1908 (5 of 1908), in respect of the following matters, namely:-*

(a) summoning and enforcing the attendance of persons and examining them on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) requisitioning any public record or copies thereof from any court or office;
(e) any other matter which may be prescribed.

(2) The Commissioner while conducting an inquiry under this Chapter shall be deemed to be a Civil Court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure,1973 (2 of 1974)."

"Section 119. No inquiry, investigation, etc., to be made if the Commissioner of Inquiry is appointed.- *Notwithstanding anything contained in the foregoing*

provisions of this Chapter, where a Commission of Inquiry is appointed under the Commissions of Inquiry Act,1952 (3 of 1952), to inquire into an accident, any inquiry, investigation or other proceeding pending in relation to that accident shall not be proceeded with, and all records or other documents relating to such inquiry shall be forwarded to such authority as may be specified by the Central Government in this behalf." (Emphasis supplied)

Likewise, **Section 3 of the Commissions of Inquiry Act,1952** read as under:

*"**Section 3. Appointment of Commission**- (1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by (each House of Parliament or, as the case may be, in the Legislature of the State), by notification in the official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite mater of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly:*

Provided that where any such Commission has been appointed to inquire into any matter-

(a) by the Central Government, no State Government shall, except with the approval of the Central Government, appoint another Commission to inquire into the same matter for so long as the Commission appointed by the Central Government is functioning;

(b) by a State Government, the Central Government shall not appoint another Commission to inquire into the same matter for so long as the Commission appointed by the State Government is functioning, unless the Central Government is of opinion that the scope of the inquiry should be extended to two or more States.

(2) The Commission may consist of one or more members appointed by the appropriate Government and where the Commission consists of of more than one member, one of them may be appointed as the Chairman thereof.

(3) The appropriate Government may, at any stage of an inquiry by the Commission fill any vacancy which may have arisen in the office of a member of the Commission (whether consisting of one or more than one member).

(4) The appropriate Government shall cause to be laid before (each House of Parliament or, as the case may be, the Legislature of the State), the report if any, of the Commission on the inquiry made by the Commission under sub-section (1) together with a memorandum of the action taken thereon, within a period of six months of the submission of the report by the Commission to the appropriate Government.)"

Rule 2(6) of the Statutory Investigation Into Railways Accidents Rules,1998 reads as under:

"2 (1)(a) Inquiry into a serious accident by the Commissioner of Railway Safety- Where the Commissioner of Railway Safety receives notice under 113 of the Railways Act, 1989(24 of 1989) hereinafter referred to as the Act, of the occurrence of an accident which he considers of a sufficiently serious nature to justify such a course, he shall, as soon as may be, notify the Chief Commissioner of Railway Safety, the Railway Board and the Head of the Railway Administration concerned of his intention to hold an inquiry and shall, at the same time, fix and communicate the date, time and place for the inquiry. He shall also issue or cause to be issued a Press Note in this behalf inviting the public to tender evidence at the inquiry and send information relating to the accident to his office address.
(1).....
(2)....

(3)....
(4)....
(5)....
(6)(a) Where having regard to the nature of the accident, the Central Government has appointed a Commission of Inquiry to inquire into the accident under the Commissions of Inquiry Act, 1952 (60 of 1952), or has appointed any other authority to inquiry into it and for that purpose has made all or any of the provisions of the said Act applicable to that authority, the Commissioner of Railway Safety to whom notice of the accident has been given shall not hold his inquiry and where he has already commenced his inquiry he shall not proceed further with it and shall hand over the evidence, records or other documents in his possession relating to the inquiry, to such authority as may be specified by the Central Government in this behalf.

(b) If, as a result of the Police Investigation a regular case is lodged in a Criminal Court by the Police or arising out of the accident, a case is lodged in a Civil Court by interested person(s), the Commissioner shall finalise his report and circulate the same as per Rule 4, as a strictly confidential document."

The aforesaid sections and Rules are referred to hereinafter alongwith Article 73 of the Constitution of India.

(B) Appointment of Commission of Inquiry and its terms of Reference:

The incident in question took place on 27th February, 2002. On 28th February, 2002, an announcement was made by the Chief Minister of the State of Gujarat, in the assembly for the appointment of a Commission under the Act of 1952. On 6th March,

2002, the Commission of Inquiry was appointed by the State of Gujarat under the Act,1952. It was one man Commission. On 21st May,2002, there was a reconstitution of the Commission. A retired Judge of the Hon'ble Supreme Court was appointed in the Commission. Thus, the Commission is now consisting of two retired Judges, one of the Hon'ble Supreme Court and another of this Court. The terms of Reference have also been added. On 20th July, 2004, further terms of Reference were expanded, so as to include the inquiry into role and conduct of the Chief Minister, other ministers, police officers, individuals etc. On 3rd June, 2002, there was an expansion of terms of Reference of the Commission appointed under the Act of 1952. At present, this Commission is functioning. The terms of reference, upon all additions, read as under:

> *(1) To inquire into-*
>
> *(a) the facts, circumstances and the course of events of the incidents that led to setting on fire some coaches of the Sabarmati Express train on 27.2.2002 near Godhra Railway Station.*
> *(b) the facts, circumstances and course of events of the subsequent incidents of violence (that took place on and from 27.02.2002 to 31.05.2002) in the State in the aftermath of the Godhra incident, and*
> *(c) the adequacy of administrative measures taken to prevent and deal with the disturbances in Godhra and subsequent disturbances in the State;*
> *(d) Role and conduct of the then Chief*

Minister and/or any other Minister(s) in his Council of Ministers, Police Officers, other individuals and organisation in both the events referred to in clause (a) and (b).
(e) Role and conduct of the then Chief Minister and/or any other Minister(s) in his Council of Ministers, Police Officers (i) in dealing with any political or non political organisation which may be found to have been involved in any of the events referred to hereinabove, (ii) in the mater of providing protection, relief and rehabilitation to the victims of communal riots, (iii) in the matter of recommendations and directions given by National Human Rights Commission from time to time.

(2) To ascertain as to whether the incident at Godhra was pre-planned and whether information was available with the agencies which could have been used to prevent the incident,

(3) To recommend suitable measures to prevent recurrence of such incidents in future." *(Emphasis supplied)*

Thus, for the aforesaid purposes, the Commission has been appointed by the State under the Commissions of Inquiries Act, 1952. Looking to the terms of Reference, which are mainly for finding out the cause of fire which had taken place in Sabarmati Express on 27th February, 2006.

(C) <u>Appointment of the Committee:</u>

The Central Government has appointed a Committee on 4th September, 2004 in exercise of the powers under Article 73 of the Constitution of India.

Another notification dated 2nd December,2005 was issued under Section 11 of the Act,1952. The Committee is also given powers under the Act of 1952. The High Level Committee has been appointed after a period of two years and six months from the date of appointment of the Commission by the State.

The terms of reference, read as under:

(a) To ascertain the precise cause of fire in Coach S-6 of Sabarmati Express on 27th February,2002 and to recommend suitable measures to prevent such incidents;
(b) To ascertain the events, developments and circumstances that took place after the train left Muzaffarpur on 25.02.2002 and before it reached Godhra and beyond (including the States of Bihar, Uttar Pradesh and Madhya Pradesh) and if those causes individually or conjointly to the fire;
(c) To ascertain why the said train, including S-6 Coach was overcrowded with passengers, many of whom were without reservation and if their behavior in any manner contributed to the fire;
(d) To ascertain if there was any wrongful act, neglect or default on the part of the officials and workmen of the railway administration and its security staff but for which such large scale loss to life and property could have been averted;
(e) To ascertain any other probable internal or external factors and/or aggravating circumstances that may have led to the tragedy;
(f) To ascertain acts of commission and/or omission responsible for the cause of fire and to fix responsibility

for the same, individually or collectively;
(g) To examine the adequacy of the fire retardant features of railway coaches and fire fighting measures with a view to including a superior technology and to suggest safeguards for prevention of fire on trains and at railway stations;
(h) To examine the preparedness and actual response with respect to rescue and relief operations in S-6 coach and recommend measures for improving the quality of response in such situation.

(D) Effect of Section 119 of The Railways Act,1989.

Section 119 starts with words "Notwithstanding anything contained in the foregoing provisions of this chapter, ...". It works as an exception to section 113 to 118 of Chapter XII of the Act,1989. Looking to the provisions of section 119 of the Act of 1989, once a Commission is appointed under the Act of 1952, no inquiry, investigation or other proceedings pending, in relation to that accident shall be proceeded with neither under section 114 nor under section 115. Section 119, creates a statutory bar. It is an admitted position of fact that the State Government has appointed the Commission under the Commissions of Inquiry Act, 1952 on 6th March, 2002. Therefore, no other inquiry or proceeding in relation to that accident can be proceeded with under

the Act,1989. This mandate is given under section 119 of the Act of 1989. In view of these facts and the position of law, even subsequent appointment of any Committee for the very same accident is not permissible, much less, under the heading and label of “High Level Committee”. The thing which cannot be done directly can never be done indirectly. What is prohibited directly, can never be permitted, indirectly so as to nullify the effect of section 119 of the Act of 1989. Looking to the facts of the present case, at much belated stage, that is, after approximately two years and seven months, from the date of the incident and after approximately two years and six months from the date of appointment of the Commission, the Committee has been appointed in violation of section 119 of the Act of 1989. Thus, the appointment of the High Level Committee vide notification dated 4th September, 2004 is violative of the provisions of the Act of 1989.

(E) Effect of Section 3 of the Commissions of Inquiry Act,1952.

State of Gujarat has appointed on 6th March,2002

a Commission for holding inquiry of cause of fire, in Sabarmati Express. Looking to the provisions of section 3 of the Act of 1952, especially section 3(1)(b) thereof, once the State Government has appointed a Commission under the Act of 1952, the Central Government shall not appoint any other Commission to inquire into the same matter so long as the Commission appointed by the State Government is functioning. Thus, under section 3 also, there is a prohibition for issuing any notification, appointing a Commission under the Act of 1952, once already a Commission has been appointed under the very same Act. Learned Senior Advocate Mr. N.D. Nanavati appearing for respondent no.1 has submitted that vide notification dated 4th September, 2004, what is appointed is not a Commission, but a “High Level Committee”. Initially, this the argument was canvassed, but, lateron, it is further developed to the extent that the Central Government has all power to appoint another Commission under the Commissions of Inquiry Act, 1952. Therefore, it is found necessary to point out at this stage that once the Commission is appointed by the State Government, under the Act of 1952, the Central Government has no power to appoint another Commission to inquire into

the same matter. Looking to the facts of the present case, here also another Commission cannot be appointed by the Central Government for the reason that already a Commission is functioning for the very same accident. Statutory bar has been created which cannot be whittle down or diluted by the appointment of the "Committee" by giving all the powers under section 11 of the Act of 1952. Relevant part of the second notification, issued by the Central Government dated 2nd December,2005, is under section 11 of the Act of 1952, reads as under:

> *"NOW THEREFORE, the Government of India, the Ministry of Railways in exercise of powers conferred by Section 11 of the Commission of Inquiry Act,1952 directs that all the provisions of the said Act shall apply to the High Level Committee."*

The Committee remains the Committee and cannot be equated with the Commission. It is also stated by the learned Senior Advocate for respondent no.1 that in fact, the Central Government can appoint a Commission under the Act of 1952 in view of entry no.22 of List-I of the 7th Schedule to the Constitution of India. This contention is also not accepted by this Court, mainly for the reason that

the whole incident had taken place within the territory of the State of Gujarat. Subject, Public order (entry 1 of List II of seventh Schedule to the Constitution of India) is such that the State has all power to inquire into, looking to the magnitude of the incident dated 27th February, 2002, in which approximately 59 persons died and approximately 24 persons were injured, there was a chaotic situation, so far as law and order is concerned, prevailing as on that date and even looking to the provisions of the Act of 1989, especially section 113, reports etc. have to be made to the District Magistrate and Superintendent of Police, incident has occurred in Gujarat. The State Government has got all power, jurisdiction and authority to appoint a Commission under the Act of 1952. Never any objection has been raised by the Union of India. After two years and seven months from the date of incident, a “Committee” has been appointed by respondent no.1 to inquire into the cause of fire. In view of the provision of section 3(1)(b) of the Act of 1952, there is a bar for appointment of another Commission for holding an inquiry for the very same cause and therefore also, the notification issued by the Central Government dated 4th September,2004 and 2nd December,2005 deserve

to be quashed and set aside, whereby initially, a High Level Committee is appointed, which was given subsequently, all the powers, under the Act,1952 (by issuing another notification dated 2nd December,2005 under section 11 of the Act,1952).

(F) Limitation upon exercise of powers under Article 73 of the Constitution of India.

Looking to the provisions of the Act of 1989, the Chief Commissioner of Railway Safety or the Commissioner as appointed under section 5 of the Act of 1989, can hold an inquiry under section 114 of the Act of 1989. As per this Act, already separate provisions have been carved out. Power and authority has been vested in a particular high ranking officer who is also given further powers under section 116 of the Act of 1989 of summoning and enforcing attendance of persons and examining them on oath, requiring production of documents, receiving evidence on affidavits, requisitioning any public record or copies thereof from any Court or office. These are the wide powers given to the Chief Commissioner of Railways Safety for holding an inquiry of an accident to a train. These powers have not been exercised for

the reasons best known to the Chief Commissioner of Railway Safety. The law, that is, the Act of 1989 is explicitly clear about,

(i) who can hold an inquiry;

(ii) power of the Commissioner.

(iii) method in which the inquiry is to be held;

There are rules, also, called the Statutory Investigation into Railway Accidents Rules,1998, drafted under section 122 of the Act,1989. Thus, the field of holding the inquiry of the accident caused to train carrying passengers was not unknown to the Act of 1989. Legislature has contemplated such an eventuality and has prescribed the procedure and invested powers in the high ranking officer. Nothing has been utilised by this Commissioner of Railways safety.

Separation of power, appears to be an ideal situation, but, under Constitution of India, such mathematical or water-tight compartment between legislature, executives and judiciary is not envisaged. There are several such situations in which cross usage of powers is permissible under the Constitution of India. Article 73 is no exception to

that Rule. Looking to the scope of power under Article 73 of the Constitution, it permits the executives to legislate, but this power is subject to the provisions of the Constitution of India. The executive power under Article 73, is co-extensive with legislative power of Union. Article 73 of the Constitution of India reads as under:

> ***"Article 73:***
>
> *(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-*
>
> *(a) to the matters with respect to which Parliament has power to make laws; and*
>
> *(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:*
>
> *Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State..to matters with respect to which the Legislature of the State has also power to make laws.*
>
> *(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof*

could exercise immediately before the commencement of this Constitution."

It is expected under the Constitution that whenever a situation arises where law is neither enacted by Parliament nor by the State Legislative Assembly, the Executive powers can be exercised so as to meet with the situation. Emergencies never come by giving advance notices. To meet this type of emergency situations, which have never been contemplated by the Parliament or by the State Legislative Assembly and no law has been enacted, immediately, powers under Article 73 can be exercised. This is known as an exception to the separation of powers. Too much usage of this type of powers and that too, de hors the provisions of the Constitution is not permissible. The learned Senior Advocate appearing for the petitioner has cited several judgments which are referred to hereinafter, whereby the interpretation of Article 73 of the Constitution has already been pronounced by the Hon'ble Supreme Court. When there is already law enacted by the Parliament or by the State Legislative Assembly, on a particular subject, to meet particular type of situation, executive powers under Article 73 cannot be utilised or exercised dehors the said law.

This is the limitation upon usage of powers under Article 73 of the Constitution of India. Law ought to be given way. Law ought to be followed and complied with by all including executives. Even for achieving better results and even for achieving better goals, no executive directions can be given in defiance of the provisions of the law already enacted by the Parliament or by the State Legislative Assembly. This usage of power tantamounts to breach of the Act and the law. Constitution permits, not, such type of usage of executive powers. Law cannot be replaced by usage of executive powers under Article 73 of the Constitution. Once field is occupied by law, no executive powers can be exercised for the very same field by the Union of India. Powers conferred under Article 73 of the Constitution is to meet with a situation, whereupon no law has been enacted or if any Act is enacted, but it is silent on a particular subject matter. As necessary corollary, the powers under Article 73 of the Constitution cannot be used, eventhough there is a law and having provisions for that very subject matter, for which powers are exercised under Article 73. This is what has been interpreted by the Hon'ble Supreme Court in the following judgments.

(i) In the case of **Rai Sahib Ram Jawaya Kapur and others vs. The State of Punjab** reported in **AIR 1955 SC 549, especially in para-12,** the Hon'ble Supreme Court has held as under:

> *"12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.*
>
> *The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.*
>
> *It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws." (Emphasis supplied)*

(ii) Similar view has been taken by the Hon'ble Supreme Court in the case of **State of Andhra Pradesh and another vs. Lavu Narendranath and others etc. reported in 1971(1) SCC 607, especially in para-15** which reads as under:

> *"15. In our view there is no substance in any of the contentions as will be apparent from our conclusions noted above and the decisions of this Court bearing on this point. The University Act, as pointed out, merely prescribed a minimum qualification for entry into the higher courses of study. There was no regulation to the effect that admission to higher course of study was guaranteed by the securing of eligibility. The Executives have a power to make any regulation which would have the effect of a law so long as it does not contravene any legislation already covering the field and the Government order in this case in no way affected the rights of candidates with regard to eligibility for admission: the test prescribed was a further hurdle by way of competition when mere eligibility could not be made the determining factor." (Emphasis supplied)*

(iii) It has also been held by the Hon'ble Supreme Court in the case of **Sant Ram Sharma vs. State of Rajasthan and others reported in AIR 1967 SC 1910, especially in para-7** thereof as under:

> *"(7) We proceed to consider the next contention of Mr. N.C.Chatterjee that in the absence of any statutory rules*

> *governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.*
>
> *(Emphasis supplied)*

(iv) It has been reiterated by the Hon'ble Supreme Court in the case of **I.T.C.Bhadrachalam Paperboards and another vs. Mandal Revenue Officer, A.P. And others reported in (1996)6 SCC 634, in para-30** as under:

> *" 30. Shri Sorabjee next contended that even if it is held that the publication in the Gazette is mandatory yet GOMs No. 201 can be treated as a representation and a promise and inasmuch as the appellant had acted upon such representation to his detriment, the Government should not be allowed to go back upon such representation. I is submitted that by allowing he Government*

to go back on such representation, the appellant will be prejudiced. The learned counsel also contended that where the Government makes a representation, acting within the scope of its ostensible authority, and if another person acts upon such representation, the Government must be held to be bound by such representation and that any defect in procedure or irregularity can be waived so as to render valid which would otherwise be invalid. The counsel further submitted that allowing the Government to go back upon its promise contained in GOMs No. 201 would virtually amount to allowing it to commit a legal fraud. For a proper appreciation of this contention, it is necessary to keep in mind the distinction between an administrative act and an act done under a statute. If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinabove, that the act done by the Government is invalid and in effect for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a "promise" or a "representation" for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. Where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. Where, of course, the matter is not governed by a law made by a competent

legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the legislature of a State has the power to make laws (Article 162 of the Constitution.) The proposition urged by the learned counsel for the appellant falls found of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well settle,d is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel. Moreover, when the Government acts outside its authority, as in this case, it is difficult to say that it is acting within its ostensible authority. If so, it is also not permissible to invoke the principle enunciated by the court of appeal in Wells vs. Minister of Housing and Local Government."

(Emphasis supplied)

Thus, if statute requires an administrative work to be done in a particular manner, the Government cannot invalidate or make ineffective for the non-compliance of the mandatory requirement of law, by issuing executive instructions under Article 73 of the Constitution of India. Here, it has been emphasised by the learned Senior Advocate appearing

for the petitioner that there is a set procedure under the Act of 1989 for holding an inquiry of an accident to a train carrying passengers. This procedure ought to be followed by the executives. This procedure cannot be given a go-bye. Looking to the facts of the present case, it appears that vide notification dated 2nd September, 2004, this procedure has not been complied with especially, what is referred to in section 114 read with section 115, 116, 117 and 118 of the Act of 1989 and therefore also, usage of powers under Article 73 of the Constitution of India for issuing notification dated 4th September, 2004 deserves to be quashed and set aside. Thus, from the aforesaid judgments, it is clear that when field of law is not occupied, or if the law is silent on a particular matter, for that subject, the executive powers can be utilised under Article 73. Usage of executive powers cannot oust the provisions of the law enacted by the Parliament or the State Legislative Assemblies. The learned Senior Advocate appearing for the petitioner as well as the learned Advocate General for the State has cited several judgments. Some of them which are referred to hereinabove, others are on the same line so far as interpretation of Article 73 of the Constitution of

India is concerned.

(G) <u>Colourable exercise of powers:</u>

It has been argued by the learned Senior Advocate for the petitioner that the impugned notification dated 4th September, 2004 under Article 73 of the Constitution of India is colourable exercise of power. Now, the question would be “what is the colourable exercise of powers” in the eye of law. It has been explained by the Hon'ble Supreme Court in the case of **R.S.Joshi Sales Tax Officer, Gujarat and others vs. Ajit Mills Limited and another reported in (1977)4 SCC 98, especially in paragraphs 13 to 16** to the effect that when there is incompetence in exercise of the powers and the powers have been exercised, such type of usage of powers is known, in the eye of law, “colourable exercise of power”. Thus, the root of colourable exercise of power lies in the meaning of a word “incompetence”. Looking to the facts of the present case and the provisions of section 119 of the Railways Act, 1989, the Central Government is incompetent to appoint any Committee for an inquiry into an accident of railway.

Statutory bar has been created under the law. As per section 3(1)(b) of the Act of 1952, also a statutory bar has been created by the Act for the Central Government for the appointment of any other Commission. Upon conjoint reading of these two provisions, namely section 119 of the Act of 1989 and section 3 of the Act of 1952, there is incompetency attached with the Central Government for appointment of any Committee or Commission. Despite this incompetency, it appears from the facts of the case that at a much belated stage, that is, after two years and six months, from the date of the appointment of the Commission by the State, the Central Government has exercised its powers and published a notification dated 4th September, 2004. Thus, the exercise of powers under Article 73 of the Constitution of India by the Central Government is, despite, the incompetency attached with Central Government and, therefore, this is a colourable exercise of power.

Para-16 of the judgment delivered in the case of **R.S.Joshi Sales Tax Officer, Gujarat and others vs. Ajit Mills Limited and another reported in (1977)4 SCC 98,** reads as under:

"16. Before scanning the decision to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on "colourable device". Certainly, this is a malignant expression and when flung with fatal effect at a representative instrumentality like the legislature, deserves serious reflection. If, forgetting comity, the Legislative wring charges the Judicative wing with "colourable" judgments, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, "colourable" is not "tainted with bad faith or evil motive"; it is not pejorative or crooked. Conceptually, "colourability" is bound up with incompetency. "Colour", according to Black's Legal Dictionary, is "an appearance, semblance or simulacrum, as distinguished from that which is real....a deceptive appearance... a lack of reality." A thing is colourable which is, in appearance only and not in reality, what is purports to be. In Indian terms, it is maya. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact,

within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act ? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary powers implied in that Entry ? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers ? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides." (Emphasis supplied)

It has been held by the Hon'ble Supreme Court in the case of **Dr. D.C.Wadhwa and others vs. State of Bihar and others reported in (1987) 1 SCC 378, especially in para-7** thereof to the effect that whenever powers have been exercised beyond the provisions of law, it is colourable exercise of powers. Thus, whenever executive powers are exercised under Article 73 of the Constitution, bypassing the provisions of the Act of 1989, it is the exercise of powers beyond the powers and what is beyond the powers is known as colourable exercise of powers. In the present case, there are no powers with the Central Government to exercise powers under

Article 73 of the Constitution of India, in face of section 119 of the Act of 1989 and section 3 of the Act of 1952. Therefore, it is the exercise of powers "beyond the powers conferred under Article 73 of the Constitution of India." Therefore, also, it known as colourable exercise of powers. Relevant portion of para-7 of the said judgment reads as under:

> "7. The determination .....Such a stratagem would be repugnant to the constitutional scheme, as it would enable the executive to transgress its constitutional limitation in the mater of law-making in an emergent situation and to covertly and indirectly arrogate to itself the law-making function of the legislature." (Emphasis supplied)

(H) Whether usage of power under Article 73 is Malafide ?

The learned Senior Advocate for the petitioner submitted that the manner in which the powers have been exercised under Article 73 of the Constitution, there are various factors which lead to believe by the petitioner that this is malafide exercise of powers. It is rightly stated by the learned Senior Advocate for the petitioner that following are the factors which have direct nexus with the allegation of mala fide exercise of power.

(i) Incident is dated 27th February, 2002

(ii) The Commission under the Act of 1952 was already appointed by the State on 6th March,2002 and after two years and seven months, from the date of the incident, the Committee has been appointed by the Central Government on 4th September,2004, against the provisions of section 119 of the Act of 1989 and section 3 of the Act of 1952;

(iii) Time to submit interim report dated 17th January, 2005, was two days prior to assembly elections of the State of Bihar;

(iv) Unnecessary wide publicity was given to the interim report so as to affect the fair trial;

(v) diagonally opposite theory of accident (instead of assault) has been propounded by the Committee appointed by the Central Government, in its interim report. It has been stated that in cases pending before Sessions Court, chargesheet propounded the theory of assault. Already **Division Bench of this Court, consisting of the Hon'ble Mr. Justice R.K.Abichandani** (As his Lordship then was) **and Hon'ble Ms. Justice H.N.Devani, in Criminal Appeal Nos.69 and 600 of**

2004 has held, paragraph-8 whereof reads as under:

> *"8. We have been taken through the record at great length and have considered the submissions of both the sides. Since the question involved is as to whether bail should be granted or not, it would not be appropriate on our part to express opinion on the reliability of the evidence on an argumentative grounds urged by the learned counsel for the parties. Police statements of witnesses, statements recorded under section 164 of the Code before the Judicial Magistrate, statements recorded under section 32 of the POTA, and other record which is read before us, prima facie shows that substantial quantity of inflammable substance like petrol had been accumulated beforehand at a nearby place and as soon as the train was halted by pulling chain, the same was used for setting bogey no. 6 on fire around 8.00 a.m. On 27th February, 2002. There are statements indicating that two meetings had taken place in the Aman Guest House, Signal faliya, Godhra in the night of 26th February, 2002, wherein Haji Bilal and Faruk Bhans had communicated a specific instruction of Maulvi Husain Umarji for setting bogey no. S-6 of the Sabarmati Express coming from Ayodhya on fire. For this purpose, Abdul Rajak Kurkur the owner of the guest house and his close associates were asked to collect petrol in the night of 26th February, 2002 itself and 140 litres of petrol had been collected from a nearby petrol pump and kept in the Aman Guest House in the night of 26th February, 2002 (Statement under section 164 of the Code before the Judicial Magistrate given by Jabir Bin Yamin Bahera on 5th February, 2003). It also appears that the movement of train was verified form the Godhra railway station in the early hours of*

27th February, 2002 as it was running four hours behind the schedule. The chain pulling was done simultaneously from various compartments soon after the train started after the first chain putting which was done at the platform. The petrol cans which were stored at Aman Guest House were taken in a loading rickshaw near the "A" cabin and the bogey was set on fire by putting burning rags inside the compartment and through broken windows by the miscreants. Few culprits had forcibly entered the compartment by cutting open the vestibule and petrol was emptied in that compartment. The passengers were terrorised by beating them and pelting of stones and were prevented from coming out from the burning compartment. Provocative slogans were shouted from the loudspeaker from a nearby mosque to arouse passions in the violent mob. Fire tenders were prevented from going near the place of the incident. Jabir Bin Yamin Bahera who gave his confessional statement under section 164 has given graphic details of the conspiracy. Moreover, Salim @ Salman Yusuf Sattar Jarda, has also given the similar version in the statement recorded under section 32 of POTA, on 20th June, 2004. We are, therefore, prima facie, satisfied that there is sufficient material to indicate that conspiracy was hatched for attacking the compartment in which Kar Sevaks were travelling from Ayodhya and that inflammable material was collected on the previous night i.e. on 26th February, 2002 in the Aman Guest House, which was quite near the place of the incident that took place near "A" cabin, when the train was halted after simultaneous pulling of chain from four compartments and where a mob of 900 persons attacked the train and some of them set the compartment S-6 on fire by using petrol, which was collected on the earlier evening. Swift manner in which the entire operation of attacking the said compartment of the train took place indicates that it was a well planned out

attacked for achieving the common object of committing these crimes for which the accused are chargesheeted."
(Emphasis supplied)

From the aforesaid judgment, it is clear that prima facie, there were statements pertaining attack by mob, collection of huge quantity of kerosene, conspiracy was hatch and there are statements before Magistrate under section 164 of the Code of Criminal Procedure,1973 and statements under section 32 of POTA. Thus, persons like the present petitioners who are the victims of the incident, who are eye witnesses to the incident, who have suffered physical injuries, whose statements have been recorded in the criminal cases, wherein charge-sheets have also been filed, are going to be affected by these observations of the Committee. It is stated by the learned Senior Advocate Mr. Nanavati for the respondent no.1 that the conclusion arrived at by the Committee is not a conclusive evidence so far as fact is concerned. The learned counsel for respondent no.1, relied upon decision rendered by the Hon'ble Supreme Court in the case of **Kahar Singh and others vs. State (Delhi Administration) reported in (1988) 3 SCC, 609.** I am in full agreement with the arguments

advanced by the learned counsel for the petitioner for the simple reason that all are not legally trained minded persons who are reading committee report. All are not legally expert persons who are reading the report of the Committee. In this country, rustic witnesses are some times giving best evidence. All who were travelling in the railway coaches of Sabarmati Express on 27th February, 2006 are not legally and judicially trained minded persons. An exactly diagonally opposite theory of accident (instead of assault) is propounded and pronouncing it may create lots of confusion during trial. Witnesses are otherwise also, mixing, truth with untruth. Otherwise also, embroidery of untruth is not unknown in criminal jurisprudence. Separation of, grain and chaff, will be more difficult in such a situation by the trial court. This affects the fair trial. Fair trial is a right of the present petitioner. There is a direct violation of the right vested in the petitioner. Fair trial includes that nobody can affect the mind of witnesses. When the Central Government is appointing a Committee, after two years and seven months from incident, over and above the Commission appointed by the State and when wide publicity is given to interim report, propounding

theory of accident and in defiance of provisions of law, as a cumulative effect, the exercise of powers under Article 73 is, just at the outskirts, of the sphere of malafide exercise of powers. There cannot be a direct proof for the malafide usage of powers. It is to be gathered from the facts and circumstances of the case. Even as per Rule (2)(6)(b) of the Statutory Investigation Into Railway Accident Rules, 1998, even when Commissioner of Railway Safety is inquiring into the accident of a passenger train under section 114 of the Act, 1989 and when criminal cases are already lodged, as a result of police investigation, the report should be a strictly confidential document. All care ought to have been taken by the concerned respondent authorities so that report may not get wide publicity. This is how right of fair trial vested in petitioner, is being affected.

Thus, as a cumulative effect of the aforesaid factors, namely, “incompetence” of usage of powers under Article 73, likewise it was beyond the powers of Central Government to issue a notification dated 4th September, 2004, therefore, colourable

exercise of power, wide publicity of interim report, effect upon right to fair trial, clear breach of provisions of Central enactments. the exercise of these powers by the Central Government, is much nearer to the malafide usage of powers. Nonetheless, this Court is not much emphasising on the malafide usage of powers, but the fact remains that wide publicity ought not to have been given to the interim report establishing, propounding and pronouncing theory of accident. At least such, report could have been kept confidential. Report establishing, propounding and pronouncing a theory of accident (in opposite to theory of assault) can affect the depositions to be given by witnesses who are not, always, legally trained minded persons. Therefore, it affects the fair trial of the case

(I) Committee, Commission and Overlapping of their sphere of work :

In one breath, it is stated by the learned Senior Advocate for respondent no.1 that what is appointed by the Central Government is not a Commission under the Act of 1952, but it is an appointment of the Committee under Article 73 of the

Constitution of India. In the same breath, exactly opposite is the stand of the Central Government that they have powers to appoint a Commission under the Act of 1952. They have clothed the Committee by giving weapons under section 11 of the Act of 1952 by issuing notification dated 2nd December, 2005. Even intervener in this case, has gone to the extent of saying that by virtue of usage of power of section 11 of the act of 1952, the Committee is converted into the Commission. This argument has been canvassed by further stating that there is no overlapping of sphere of work by both, the Commission and the Committee. Comparative sphere of work has been pointed out and it is stated by the learned Senior Advocate for respondent no.1 that Union of India has got all powers to appoint even the Commission under the Act of 1952. This attractive argument advanced by the learned counsel for respondent no. 1 and by the learned counsel for the intervener is not accepted by this Court for the simple reason that if the sphere of work of both Committee and Commission are looked into closely, they are super imposable with each other. Both are related with the same incident. Both are concerned with the cause of fire. Both are concerned with the facts and circumstances, which

have lead to the setting of fire to some coaches of Sabarmati express. Both the Commission and the Committee are looking at the same incident. One may be from the North and another may be from the South. In fact, checking of, Pith and substance, of sphere of work, is necessary only when two Commissions are appointed, one by the State and another by the Central Government under the Act of 1952. Otherwise this comparison is not necessary. Therefore, this Court is not much analysing the comparison and the ratio laid down by the Hon'ble Supreme Supreme Court in the case of **State of Karnataka vs. Union of India and another reported in (1977) 4 SCC, 608,** wherein both the State of Karnataka as well as the Central Government had appointed the Commission under the Commissions of Inquiry Act, 1952. Once Commission is appointed under the Act, 1952, as per section 119 of the Act of 1989, no further committee can be appointed for holding an inquiry of accident of a passenger train. Therefore, even indirectly, a High Level committee can also not be appointed by using powers under Article 73 of the Constitution of India.

(J) Authorised purpose and unauthorised purpose:

It is stated by the learned Senior Counsel for the petitioner that if authorised purpose and unauthorised purpose for the appointment of the Committee are so interwoven with each other, that they cannot be segregated, one has to look at the predominant purpose. It is stated by the learned Senior Advocate for the respondent no.1 that the Committee is appointed to advise to the Central Government and to ascertain the cause of fire, which took place on 27th February, 2002 in Sabarmati Express which passes through more than one State and therefore, only the Committee can inquire into the matter. Contention of respondent no.1 is not accepted because, looking to the sphere of work of the Committee, it appears that the predominant purpose for appointment of the Committee was to ascertain the cause of fire and the facts and circumstances which have led to the cause of fire and to ascertain who caused the fire. If this predominant purpose is looked into, then, this appointment of the committee is, beyond the executive powers, due to section 119 of the Act, 1989 and due to section 3(1)(b) of the Act, 1952. Thus, looking to the “predominant purpose”, the appointment of the committee was beyond the powers under Article 73 of the Constitution.

Unauthorised purpose means what is barred by the law. Thus, if "predominant purpose" is not authorising Central Government to exercise powers under Article 73, a Committee cannot be appointed even under, the guise that part of the cause for appointment, of the Committee, is authorising the Central Government. As stated hereinabove, the very exercise of powers by the Central Government is not permissible because the law is already in force, namely the Act of 1989. Detailed procedure for holding an inquiry has already been there, especially under sections 113, 114, 115 and 117 thereof. There was no need to by-pass these provisions. Unauthorised purpose means what is barred under the Act. It has been held by the Hon'ble Supreme Court in case of **P.V.Jagannath Rao and others vs. State of Orissa and others reported in AIR 1969 SC 215 especially in para-8** as under:

> *"8. It is well settled that if a statutory authority exercises its power for a purpose not authorised by the law the action of the statutory authority is ultra vires and without jurisdiction. In other words, it is a mala fide exercise of power in the eye of law, i.e., an exercise of power by a statutory authority for a purpose other than that which the Legislature intended [See The King v. Minister of Health,1929-1 KB 619). But the question arises as to what is the legal position if an*

administrative authority acts both for an authorised purpose and for an unauthorised purpose. In such a case where there is a mixture of authorised and unauthorised purpose, what should be the test to be applied to determine the legal validity of the administrative act? The proper test to be applied in such a case is as to what is the dominant purpose for which the administrative power is exercised. To put it differently, if the administrative authority pursues two or more purposes of which one is authorised and the other unauthorised, the legality of the administrative act should be determined by reference to the dominant purpose. This principle was applied in Rex v. Brighton Corporation; ex parte Shoosmith, (1907) 96 LT 762. A Borough Corporation expended a large sum of money upon altering and paving a road, which was thereby permanently improved, but they decided to do the work at the particular time when it was done in order to induce the Automobile Club to hold motor trials and motor races upon it. The Court of Appeal (reversing the decision of the Divisional Court), refused to intervene, and it was observed by Fletcher-Moulton, L.J. at page 764 as follows:-

"It cannot be denied that the physical act of changing the surface of a road when the corporation thought fit and proper so to do was within their statutory powers and there is no case proved by the evidence which shows either that they wastefully used the public money or that they did so with improper motives. The case would be quite different if one came to the conclusion that under the guise of improvement of a road, certain moneys had been used really for diminishing the expenses of the Automobile Club or anything of that sort and that there had been a turning aside of public moneys to illicit purposes".

The principle was applied by Denning, L. J. in Earl Fitzwilliam's Wentworth Estate Co. Ltd. v. Minister of Town and Country Planning, 1951-2 KB 284. It was a case concerning the validity of a compulsory purchase made by the Central land Board, and confirmed by the Minister, under the provisions of the Town and Country Planning Act, 1947, in respect of a plot of land, ripe for development, which the owner was not prepared to sell at the existing use value. The landowner applied to have the order quashed, as not having been made for any purpose connected with the Board's function under the Act, but for the purpose of enforcing the Board's policy of sales at existing use values. The majority (consisting of Somerwell and Singleton, L. J.) held that, though the main purpose of the Board may well have been to induce landowners in general and the company, in particular, to adopt one of the methods of sale favoured by the Board, it was nevertheless in connection with their function as the authority operating the development charge scheme, and at any rate, "the case was not one in which it could be said that powers were exercised for a purpose different from those specified in the statute". Denning, L. J. disagreed with the majority and held that the dominant purpose of the Board was not to assist in their proper function of collecting the development charge, but to enforce their policy of sales at existing use value only. The dominant purpose being unlawful, the order was invalid, and could not be cured by saying that there was also some other purpose which was lawful. The Board and the Minister had misunderstood the extent of their compulsory powers and their affidavits showed that they had overlooked that their ultimate purpose in exercising their powers should be connected with the performance of the Board's functions under the Act. At page 307 of the Report Denning L. J. observed as follows:-

"What is the legal position when the board have more than one purpose in mind? In the ordinary way, of course, the courts do not have regard to the 'purpose' or 'motive' or 'reason' of an act but only to its intrinsic validity. For instance, an employer who dismisses a servant for a bad reason may justify it for a good one, so long as he finds it at any time before the trial. But sometimes the validity of an act does depend on the purpose with which it is done-as in the case of a conspiracy-and in such a case, when there is more than one purpose, the law always has regard to the dominant purpose. If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had some other purpose in mind and which was lawful: see what Lord Simon, Lord Maugham and Lord Wright said in Crofter Hand Woven Harris Tweed Co. v Veitch, (1942 AC 435, 445, 452-3, 469, 475).

So also the validity of government action often depends on the purpose with which it is done. There, too, the same principle applies. If Parliament grants a power to a government department to be used for an authorized purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinate to some other purpose which is not authorised by law, then the department exceeds its powers and the action is invalid."

(Emphasis supplied)

(K) Effect of breach of Section 119 of the Act of 1989 with breach of section 3 of the Act of 1952 and excessive usage of power under Article 73 of the Constitution of India:

It has been contended by the learned counsel for the intervener that the term of the Committee is over. The report has been published and therefore, the petition has become infructuous, whereas the learned Advocate General appearing for the State of Gujarat and the learned Senior Advocate for the petitioner have submitted that as a cumulative of the breach of section 119 of the Act of 1989 and section 3 of the Act of 1952, it leads to such a legal situation that the notification dated 4th September, 2004 is void and is therefore, bad in the eye of law and all subsequent actions are nullity. The learned Senior Counsel for the petitioner submitted that the very appointment of the Committee is under challenge, by the petitioner. Looking to the provisions of sections as stated hereinabove and the circumstances under which powers under Article 73 of the Constitution of India can be exercised, I am of the opinion that exercise of executive powers, under Article 73 of the Constitution of India cannot oust the law. The Act enacted by the Parliament or by the State Legislative Assembly ought to be followed. In absence of such law or when law is enacted and is silent, then only powers can be exercised under

Article 73 of the Constitution of the India. Exercise of powers under Article 73 of the Constitution is an exception to the general rule of separation of powers. Only in limited and compelling circumstances, such powers can be utilised. Limitations have been enumerated in the aforesaid paragraphs. Once a law is passed, executive power can be exercised only in accordance with such law. Limitations have also been explained in various judgments as stated hereinabove, upon exercise of powers under Article 73 of the Constitution of India. The learned Advocate General has relied upon the case decided by the Hon'ble Supreme Court in the case of **A.Umarani vs. Registrar, Cooperative Societies and others reported in (2004)7 SCC 112, especially paragraphs 22 and 23** thereof read as under:

> *"**22. Section 182 of the 1983 Act** reads as under:*
>
> *"**182. Power of Government to give directions**:-(1) The Government may, in the public interest, by order direct the Registrar to make an inquiry or to take appropriate proceedings under this Act, in any case specified in the order and the Registrar shall report to the Government th result of the inquiry made or the proceedings taken by him within a period of six months from the date of such order or such further period as the Government may permit.*

(2)In any case, in which a direction has been given under sub-section (1), the Government may, notwithstanding anything contained in this Act, call for and examine the record of the proceedings of the Registrar and pass such orders in the case as they may think fit:

Provided that before passing any order under this sub-section the person likely to be affected by such order shall be given an opportunity of making his representation."

23. A bare perusal of the aforementioned provision would clearly go to show that the impugned government order could not have been issued by the State in terms thereof as the same can be taken recourse to only for the purposes mentioned therein and not for any other. It is not a case where the Government directed the Registrar to make an inquiry against a person in the public interest. Article 162 of the Constitution of India provides for extension of executive power to the matters with respect of which the legislature of the State has power to make laws. Article 162 of the Constitution by no stretch of imagination is attracted as the source of the power of the State to pass an appropriate order must be traced to the provisions of the Act itself. <u>If the State had no power to issue the said GOMs No. 86 dated 12.3.2001, the same must be held to be a nullity</u>."

(Emphasis supplied)

In view of the aforesaid decision, when the action of issuance of notification is patently de horse the Act of 1989 and the Act of 1952, it is void in the eye of law. Therefore, it must be held as a

nullity for all the purposes. Report, therefore, given by the High Level Committee appointed by the Central Government dated 4th September, 2004 is of no consequence at all.

(L) LOCUS STANDI

It has been contended by the learned counsel for the respondent no.1 that the petitioner has no locus standi to file the present petition. This contention is not accepted by this Court for the simple reason that the present petitioner is vitally affected by the action of the Central Government. The petitioner is not a total stranger to the incident. The petitioner was a passenger in the train as on the date of the incident. He has suffered physical injuries. His statement as well as his wife's statement have been recorded by the Investigating Officer. Charge-sheet has been filed in the criminal case. Claims for compensation has also been allowed by the Railway Claims Tribunal. He was also hospitalised for longer time. The petitioner is bringing to the notice of this Court that the powers exercised under Article 73 of the Constitution of India is de hors the provisions of the Act of 1989 and the Act of 1952. It is contended by the learned

counsel for the petitioner that before the Railway Claims Tribunal the stand of the Department is that the mob has caused fire. This aspect of the matter has been stated in the judgment delivered by the Railway Claims Tribunal, Ahmedabad in Claim Application being OA-03-00-302 (Annexure “F”). The theory propounded in the Committee's interim report is exactly opposite the theory of assault. It affects the right of fair trial to the petitioner. The learned counsel for the petitioner has rightly relied upon the judgment delivered by the Hon'ble Supreme Court in the case of **Gadde Venkateswara Rao V/s. Government of Andhra Pradesh and others reported in AIR 1966 SC 828, para-8** whereof reads as under:

> *“8. The first question is whether the appellant had locus standi to file a petition in the High Court under Art. 226 of the Constitution. This Court in Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal,(1962) Supp 3 SCR 1 at p.6: (AIR 1962 SC 1044 at p.1047), dealing with the question of locus standi of the appellant in that case to file a petition under Art. 226 of the Constitution in the High Court observed:*
>
> *Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than*

those claiming fundamental right can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right..... The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified."

Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharmajigudem. The villagers of Dharmajigudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Centre. The said committee collected Rs. 10,000 and deposited the same with the Block Development Officer. The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of the location of the Primary Health Centre at Dharmajigudem. His conduct, the acquiescence on the part of the other members of the committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorized to act on behalf of the committee. The appellant was, therefore, a representative of the committee which was in law the trustees of the amounts collected by it from the villagers for a public purpose. We have, therefore, no hesitation to hold that the appellant had the right to maintain the application under Art. 226 of the Constitution. This Court held in the decision cited supra that "ordinarily" the petitioner who seeks to file an application under Art. 226 of the

Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart, in exceptional cases as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Art. 226 of the Constitution at his instance is, therefore, maintainable."

(Emphasis supplied)

It has been held in the aforesaid judgment that the persons who are affected by the act or omission of the authority can file a writ petition eventhough he has no proprietory or even fiduciary interest, in the subject matter thereof. Likewise, as per judgement delivered in the case of **M.S.Jayaraj V/s. Commissioner of Excise, Kerala and others reported in (2000)7 SCC 552** (para 12 and 14) also permits Locus to the petitioner. It has been held that the Court has changed from the earlier strict interpretation regarding locus standi and a much wider canvass has been adopted in the later years regarding person's entitlement to move the High Court. Para 12 and 14 of the said judgement, read as

under:

> *"12. In this context we noticed that this Court has changed from the earlier strict interpretation regarding locus standi as adopted in Nagar Rice & Flour Roshan Kumar and a much wider canvass has been adopted in later years regarding a person's entitlement to move the High Court involving writ jurisdiction. A four-Judge Bench in Jasbhai Motibhai Desai pointed out three categories of persons vis-a-vis the locus standi: (1) a person aggrieved; (2) a stranger; and (3) a busybody or a meddlesome interloper. Learned Judges in that decision pointed out that anyone belonging to the third category is easily distinguishable and such person interferes in things which do not concern him as he masquerades to be a crusader of justice. The judgement has cautioned that the High Court should do well to reject the petitions of such busybody at the threshold itself. Then their Lordships observed the following: (SCC p.683, para 38)*
>
> > *"38. The distinction between the first and second categories of applicants, though real, is not always well demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be 'persons aggrieved'.*

14. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits."

(Emphasis supplied)

It has been observed in the judgement delivered in the case of **Dr.D.C.Wadhwa and other V/s. State of Bihar and others reported in (1987)1 SCC 378 in para 3 and 7**, as under :

"3 ....The rule of constitutes the core of our Constitution and it is the essence of the rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitations and if any practice is adopted by the executive which is in flagrant and systematic violation of its constitutional limitations, petitioner has a member of the public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of this Court to entertain the writ petition and adjudicate upon the

validity of such practice. We must therefore reject the preliminary contention raised on behalf of the respondents challenging the locus of the petitioners to maintain these writ petitions."

7. .... It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision. This is precisely what was pointed out by Mukherjea, J. Speaking for the Court in K.C.Gajapati Narayam Deo V. State of Orissa:

In other words, it is the substance of the Act that is material and not merely the form of outward appearance, and if the subject matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method.

So also in P. Vajravelye Mudaliar V. Special Deputy Collector, Madara a Constitution Bench of this Court observed that when it is said that legislation is a colourable one, what is means is that the legislature has transgressed it legislative power in a covert or indirect manner, if it adopts a device to outstep the limits of its power." *(Emphasis supplied)*

Looking to these facts, there is a locus standi to the petitioner to prefer the present petition.

Judgements cited by respondent No.1 reported in AIR 1962 SC 1044 and (1976)1 SCC 675 are not useful to the respondent No.1 in view of the aforesaid proposition of law as interpreted by Hon'ble Supreme Court as well as looking to the facts of the present case that petitioner was a passenger in the train, he is injured eyewitness and it also a victim he was hospitalised etc. as stated hereinabove.

(M) Rule 2(6) of the Statutory Investigation Into Railway Accident Rules, 1998:-

> *"2. (1)(a) Inquiry into a serious accident by the Commissioner of Railway Safety:- Where the Commissioner of Railway Safety receives notice under section 113 of the Railways Act, 1989 (24 of 1989) hereinafter referred to as the Act, of the occurrence of an accident which he considers of a sufficiently serious nature to justify such a course, he shall, as soon as may be, notify the Chief Commissioner of Railway Safety, the Railway Board and the Head of the Railway Administration concerned of his intention to hold an inquiry and shall, at the same time, fix and communicate the date, time and place for the inquiry. He shall also issue or cause to be issued a Pres Note in this behalf inviting the public to tender evidence at the inquiry and send information relating to the accident to his office address.*
> *(2).....*
> *(3).....*
> *(4).....*

(5).....
(6) (a) Where having regard to the nature of the accident, the Central Government has appointed a Commission of Inquiry to inquire into the accident under the Commission of Inquiry Act, 1952 (60 of 1952), or has appointed any other authority to inquire into it and for that purpose has made all or any of the provisions of the said Act applicable to that authority, the Commissioner of Railway Safety to whom notice of the accident has been given shall not hold his inquiry and where he has already commenced his inquiry he shall not proceed further with it and shall hand over the evidence, records or other documents in his possession, relating to the inquiry, to such authority as may be specified by the Central Government in this behalf.

(b) If, as a result of the Police Investigation, a regular case is lodged in a Criminal Court by the Police or arising out of the accident, a case is lodged in a Civil Court by interested person(s), the Commissioner shall finalise his report and circulate the same as per Rule 4, as a strictly confidential document."
(Emphasis supplied)

The learned counsel for the respondent no.1 has pointed out with the help of the aforesaid Rules, provisions of section 119 of the Act of 1989 should be interpreted. This Rule permit only the Central Government to appoint a Commission and therefore, section 119 of the Act of 1989 permits only the Central Government to appoint a Committee, even where a Commission is already appointed under the

Act of 1952. This argument is not accepted by this Court, firstly for the reason that the Rules cannot expand or abridge the scope of the Act. Secondly for the reason that what is prohibited by the Act, cannot be interpreted to have been permitted with the help of the Rules. Section 119 of the Act of 1989 prohibits the appointment of any Committee for holding an inquiry of accident of a passenger train, once Commission is appointed under the Act of 1952. This prohibition cannot be read as permission with the help of Rule 2(6) of the Rules of 1998. On the contrary, Rule 2(6) prohibits the publicity of the report when investigation of the case has resulted into a regular case in the criminal Court. On the contrary, it never permits any violation of section 119 of the Act of 1989.

8. As a cumulative effect of the aforesaid facts, reasons and the judicial pronouncements, the appointment of the Committee vide notification dated 4th September, 2004 issued under section 73 of the Constitution of India, in exercise of Executive Powers, and further notification dated 2nd December, 2005 issued under section 11 of the Act of 1952 are bad in law and are hereby quashed and set aside.

The interim report given by the High Level Committee shall not be published and shall not be tabled on the floor of the Parliament. As such this direction is not necessary because the learned Senior Counsel for respondent no.1 submitted that what is appointed by the notification dated 4th September, 2004 is not a Commission under the Act of 1952, but an argument was developed by the learned counsel for respondent no.1 that the Committee is empowered under section 11 of the Act of 1952. It was also argued by the learned counsel for respondent no.1 that they have got all powers to appoint the Commission under section 3 of the Act of 1952, but they have appointed only a Committee. Keeping in mind this argument of the learned Senior counsel for respondent no.1, a direction is given that the report given by the Committee is not be he laid before the Parliament (which is otherwise, a requirement under section 3(4) of the Act, 1952, for a Commission. Interim relief to that effect was already given by this Court vide order dated 7th March, 2006 which was confirmed by the Division Bench of this Court in LPA No. 364 of 2006 vide order dated 20th March, 2006. Rule made absolute with no order as to costs.

(D.N.PATEL,J)

After pronouncement of the above judgment, the learned advocate for respondent no.1 has requested to stay the implementation and operation of this judgment to approach the higher forum. The learned advocate for the petitioner has opposed this request. Looking to the facts, reasons and judicial pronouncements, as stated above, the request for stay of the judgment is not accepted.

(D.N.PATEL,J)

*darji/dipti